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No. 73-1135

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In the Supreme Court of the United States

OCTOBER TERM, 1973

LLOYD WILLIAM SAHLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted of willfully failing to file income tax returns for the years 1965, 1966, and 1967, in violation of Section 7203 of the Internal Revenue Code of 1954, 26 U.S.C. 7203. He was fined $2,000 and sentenced to concurrent terms of 60 days' imprisonment in a jail-type institution and to probation for the balance of one year. The court of appeals affirmed (Pet. App. A). Petitioner here challenges the admission and exclusion of certain evidence at trial.

The government showed at trial that petitioner had received gross income from business activities of approximately $63,000, $40,300, and $39,700 during the three years in question (I. R. 7A-9A; II R 450A-

453A).[1] Petitioner presented two alternative defenses at trial. His principal contention was that the business receipts in question did not constitute gross income but rather were loans which he was liable to repay (see, *e.g.*, III R. 996A-1026A). His secondary contention was that even if the receipts in fact were gross income, he had in good faith believed that they need not be reported as such (see, *e.g.*, III R. 1027A).

Testimony about the advice given to petitioner by his accountant was introduced as to both defenses. The accountant testified that he had advised petitioner that the receipts in question were "probably" not taxable income (II R. 425A) and that it "looked as though" petitioner would not be required to file returns (II R. 408A). A letter which the accountant had sent petitioner with respect to the taxability of the receipts and the necessity of filing a return was read to the jury twice—once by the accountant (II R. 406A-407A), and once by petitioner (III R. 801A-803A). Petitioner further testified that he had discussed his tax situation at length with his accountant (III R. 792A-801A) and had relied upon his accountant's oral and written advice in not filing tax returns (III R. 803A). Petitioner was not permitted to testify as to the substance of the oral advice given him by his accountant (III R. 788A to 786A-1), but he had made no offer to prove that the oral advice was different in any way from the written advice contained in the letter which was read to the jury.

Petitioner's claim throughout the trial was that the receipts in question were loans from a group of corporations controlled by Robert Dennis, who testified for

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[1] "R." refers to the four volume record appendix filed in the court of appeals.

the defense. Upon cross-examination, the government introduced a copy of a corporate financial statement (Gov. Ex. 77; II R. 682A, 684A), which did not indicate the existence of any such indebtedness.[2] Dennis acknowledged that the copies bore his signature as president of the corporations, that he had caused the statements to be prepared, and that he would not have signed an inaccurate financial statement (II R. 675A-676A).

The government introduced a work sheet summarizing petitioner's gross income for the years in question, which included $3750 received by his wife as income in 1967 (I R. 249A; IV R. 1345A). The Form W-2 indicating her income was also introduced in evidence as part of a composite exhibit of Forms W-2 pertaining to both spouses (II R. 403A).

1. The trial court, in rejecting petitioner's testimony as to the substance of the oral advice allegedly given by his accountant, apparently determined that such testimony was being offered as part of petitioner's principal defense, *i.e.*, to show that his business receipts were not taxable, and that for that purpose it was inadmissible hearsay. We of course concede, as we did in the court of appeals, that the testimony was admissible on the issue of willfulness. However, we believe that the court of appeals was correct in holding that, in view of the cumulative nature of petitioner's

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[2]The original statement could not be located in the corporate files at the time of trial (II R. 752A). A government agent testified that the copy introduced in evidence had been made from the original in his presence at the corporate offices (II R. 679A-680A). This constituted sufficient authentication. IV Wigmore, *Evidence* (Chadbourn rev.) §§1192, 1265, 1280.

offered testimony, which apparently would merely have reiterated the substance of the accountant's own testimony, including the letter which had already been read into evidence, petitioner was not prejudiced by the trial court's ruling. Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 230-231.[3]

2. The copy of the corporate statements was introduced not as a business record, as petitioner contends (Pet. 8-11), but as "past recollection recorded" (II R. 676A). It was properly admitted in evidence for that purpose. See, *e.g.*, *McGarry* v. *United States*, 388 F. 2d 862, 869 (C.A. 1), certiorari denied, 394 U.S. 921; *United States* v. *Kelly*, 349 F. 2d 720, 770 (C.A. 2).

3. Petitioner did not object to the introduction of the work sheet which showed his wife's income, but only to the admission of the composite exhibit of Forms W-2 pertaining to both his own income and that of his wife. Petitioner's own Forms W-2 were clearly admissible, and it does not appear from the record that petitioner's objection was directed only at the portion of the exhibit pertaining solely to his wife's income. In any event, since petitioner and his wife had consistently filed joint returns in prior years (see, *e.g.*, Gov. Ex. 34, IV R. 1290A *et seq.*), proof of her income during the years in question was relevant to the question whether his failure to file had been willful.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.

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[3]There is no conflict here with *Miller* v. *United States*, 120 F. 2d 968 (C.A. 10), or *United States* v. *Kennedy*, 291 F. 2d 457 (C.A. 2), neither of which involved a question of cumulative testimony.